DUE PROCESS OF LAW
VIS-A-VIS
PROCEDURE ESTABLISHED BY LAW

DISSERTATION

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By
ABDUL QUAIYUM

Under the Supervision of
Prof. SHARIFUL HASAN FAROOQUI

FACULTY OF LAW
ALIGARH MUSLIM UNIVERSITY
ALIGARH (U. P.) INDIA

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Prof. Shariful Hasan Farooqui

FACULTY OF LAW,
ALIGARH MUSLIM UNIVERSITY,
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C E R T I F I C A T E

Certified that Mr. Abdul Quaiyum student of LL.M. Final bearing Roll No. 90LL.M.05, Enrol. No. S-7866 has completed the study entitled "Due process of Law Vis-a-Vis Procedure established by law" in partial fulfilment of the requirements for the award of LL.M. degree. under my supervision.

I wish him all success.

(SHARIFUL HASAN FAROOQUI)
Professor

D E D I C A T I O N

THIS WORK IS DEDICATED TO

MY REVEREND PARENTS

AND

BELOVED WIFE

C O N T E N T S

A C K N O W L E D G E M E N T

In the name of Allah, the merciful, the benevolent, The compassionate, with whose blessings the red letter day had come when I had been able to fulfil this uphill task.

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Abdul Queiyum

(ABDUL QUAIYUM)

I N T R O D U C T I O N

The history of the 5th and 14th amendments in the American Constitution, has been, in the main, the history of the Supreme Courts interpretation of the 'due process' clause. In American Constitutional law, "no doctrine has enjoyed greater prestige than 'due process'. 'Due process' was associated generally with procedural rights. "The generation that fought the Civil War usually identified due process with common law procedure".[1] It believed that due process was designed principally to provide persons accused of crimes with the right to counsel, protection against arrest without a warrant, and other procedural safeguards. The framers of the Fourteenth Amendment, too, thought that due process of law had "the customary meaning recognised by the courts", which was unquestionably prodecural. But later on 'due process of law' was held to guarantee substantive as well as procedural rights. The most important case was Wynehamer V. New York[2], where a state law was held invalid on the ground that it violated the due process clause in the state constitution.

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1. Charles M. Hough, "Due process of law-Today", 'Harward Law review, Vol 32 (1918-19) p. 224
2. 13 N.Y. 378 (1856).

The Supreme court began to accept the doctrine that due process of law could be used to protect substantive as well as procedural rights against legislative actions. The courts revolutionary shift from a narrow to broader conception of due process was gradual but unmistakable. The court thus converted the due process clause into a positive, judicially enforced restriction over state legislation. After 1890, the Supreme Court was to become the "perpetual censor " of state legislation under the fourteenth Amendment and federal laws under the Fifth Amendment. This new doctrine imposed upon the courts a new duty, the duty of applying to legislation the limitations of due process of law. Secondly, this duty made it neeessary for the courts to determine just how the guarantees of due process of law could be used as yardsticks for measuring the validity of such legislation.

This American doctrine of 'due process' was inducted in India in Draft Art 15 as originally passed by the constituent Assembly. And the doctrine was supported by various arguments. But the Drafting committee suggested the substitution of the expression "except according to procedure established by law" for the words "without due process of law", by giving his own reasons.

Ultimately suggestions of Drafting committee prevailed over constituent Assembly. This change was the result of a discussion which the constitutional adviser, Sir B.N. Rau had with Mr. Justice Frankfurter of the U.S. Supreme Court.

The interpretation of the phrase 'procedure established by law in Art. 21 came for consideration before supreme court in Gopalan's case. The supreme court in that case pointed out that the American concept of due process is foreign to the Indian constitution and that in Art. 21 the expression "law" means only state made law and that in the absence of the concept of due process it is not open to the court to test the law on the touch-stone of reasonableness (Fazl Ali J. Dissenting). True it is that there is provision in Art. 19 for testing the reasonableness of laws regarding various aspects of freedom, including freedom of movement which was the right affected by the legislation impugned in that case. But that Article could not be invoked for as observed by Kania, C.J.,

> "The question of the application of Art. 19 does not arise. The true approach is only to consider the directness of the legislation and not what will be the result of the detention, otherwise valid, on the mode of the detenu's life."

The court held that the legislation in question directly related to personal liberty and preventive detention and so was governed only by Arts 21 and 22. Since Art 19(1) (d) related to freedom of movement, which was a different right, and the impugned legislation was not directly concerned with it the petitioner could not be permitted to invoke Art 19 (1) (d).

The way the majority handled Art. 21 in Gopalan was not free from criticism. Gopalan was characterised as the high-water-mark of legal postivism. Court's approach was very strict and purely literal and was too much coloured by the positive or imperative theory of law.[3] The way Art. 21 was interpreted made it impotent against legislative power which could make any law, however drastic, to impose restraints on personal liberty without being obligated to lay down any reasonable procedure for the purpose. It was not for the court to judge whether the law provided for fair or reasonable procedure or not. Some of the arguments adopted by the majority to reach the result could not stand close scrutiny for instance, the concept of natural justice decried by the court as vague and uncertain, is not unknown in India.

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3. Edward Mc Whinney, Judicial review 133-138

Two decades had to pass before the rationale underlying Gopalan's case could be dissected and rejected. The opportunity for this purpose presented itself in the Bank's Nationalisation[4] Case. Shah. J., has now intimated:

> "In our judgement, the assumption in Gopalan's case that certain articles in the constitution exclusively deal with specific matters and in determining whether there is infringement of the individuals guaranteed rights, the object and the form of the state action alone need be considered, and effect of the laws on fundamental rights of the individuals in general will be ignored cannot be accepted as correct."

The decision of the Supreme Court in the Bank Nationalisation case is a momentous decision not merely for the reason that it had to deal with a legislative measure destined to have a tremendous impact upon the country's economy but for the further reason that it has spelled out a new mode of approach to constitutional guarantees reorienting the techniques of interpretation which have prevailed with the supreme court in the first two decades after the inauguration of the new constitution

4. (1970) 1 S.C.J. 564

This decision bids fair to be the starting point of a bold re-interpretation of the constitution upsetting many old faiths, creating new concepts and opening up new horizons in the spacious domains of Indian constitutional law.

The doctrine as propounded by Supreme Court in Bank Nationalisation was that the theory that the object and form of the state action determine the extent of protection which the aggrieved party might claim was not consistent with the constitutional scheme. The true view was that the extent of protection against impairment of a fundamental right was determined not by the object of the legislature nor by the form of the action, but by its direct operation upon the individuals right.

It was explained in Shambhu Nath Sarkar V. State of W.B. that the major premise of the majority in the Gopalan case was held to be incorrect in the Bank Nationalization case. Thus though a preventive detention law may pass the test of Art. 22, it has yet to satisfy the requirement of other fundamental rights such as Art.19.

Subsequently in the Maneka Gandhi, which is a landmark case of the post emergency era, in his exposition of the

concept of procedure in Art. 21 Bhatwati, J. was inspired by the great equalising principle enunciated in Art.14, and extended its application to the nature and requirement of the procedure under Art.21. Thus Maneka was limited to procedural due process.

It was only in Bachan Singh's case when the scope of substantive due process was recognized. This time the 'prodecure' was interpreted as including both substantive and procedural due process.It was rightly observed that the substantive and procedural portions of law affecting deprivation are so inseparable that both must stand the test of reasonableness, fairness and justness.

This means that Gopalan's case was wrongly decided. The law challenged in that case should have been tested with reference to Art. 19(1)(d).

In short, Art. 19 now bids fair to be the due process clauseof the Indian constitution. As early as 1956 in Mysore University Extension Lecture on "The Legal pillars of our Democracy" Prof. G.C. Venkata Subbarao pointed out "Due process is only a formula which enables the court to test the reasonableness of laws made by the legislature. Art. 19 of our constitution confers upon our

courts the power of testing laws on the touchstone of reasonableness. That in my humble opinion, is our due process clause and the palladium of our liberties."

The recent decisions of the Supreme Court thus represents a veritable watershed in the progressive and purposive evolution of constitutional doctrine by the interpretive process of the supreme court.

In this work a humble attempt is made to unfold the judicial interpretation of procedure established by law. I have devoted special attention to the numerous techniques of interpretion developed by the judiciary in testing legislation on the touchstone of the constitution. This, it is hoped, will facilitate the task to understand the reasoning given by court.

In this work first chapter deals with the origin and meaning at the phrase 'due process' evolved by various cases.

Second chapter deals with what is the concept of due process in American constitution, how it was adopted and what were the reasons for its adoption.

In third chapter I have made the fullest use of

the constituent Assembly Debates so that the basic intentions of the founding fathers may be prominently borne in mind in following up the subsequent legal developments. It records how the words" due process" were substituted for the phrase'procedure established by law'.

In fourth chapter I have dealt with Gopalan's case. In this chapter I have discussed, how the majority favoured the strict and literal interpretation of Art. 21. The court's approach was very negative and influenced by imperative theory of law. The court's attitude however, somewhat liberalised in Bank Nationalization case.

But the positive and liberal interpretation of Art 21 was followed in Maneka Gandhi's case. This time Art 21 was interpreted very widely and the procedural safeuard was included in Art 21. It was only in Bachan Singh's case when Art 21 was interpreted to include procedural as well as substantive safeguard, and this has been discussed in Chapter fifth.

CHAPTER - I

MEANING OF THE PHRASE "DUE PROCESS"

Due process clauses are found in U.S. Constitution. 5th amendment of the U.S. constitution provides inter alia,

"No person shall be deprived of his life, liberty or property without due process of law".

Another due process clause is found in the 14th amendment, which lays down inter alia,

"No state shall deprive any person of life liberty and property, without due process of law".

The former is pertaining to the federal government and the latter protects persons from state action. There are two aspects : Procedural in which a person is guaranteed fair procedures and the second is substantive which protects a persons property from unfair governmental interference or taking. Similar clauses are in most state constitutions.

What 'due process of law' exactly means, is difficult to define even at the present day. The constitution contains no description of what is 'due process of law',

nor does it declare the principles by application of which it could be ascertained. In Twinning V. New Jersey[1], the court observed:

> "Few phrases in the law are so elusive of exact apprehension as this. This court has always declined to give a comprehensive definition of it and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decisions of cases as they arise".

Black's law dictionary defines 'Due process of law' as law in its regular course of administration through courts of justice. Due process of law in each particular case means such an exercise of the powers of the govt. as the settled maxims of law permit and sanction, and under such safe guards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs. A course of legal proceedings according to those rules and principles which have been established in American systems of jurisprudence for the enforcement and protection of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution that is, by the law

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1. 211 U.S. 79

of its creation - to pass upon the subject matter of the suit; and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance.[2]

Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgement upon the question of life, liberty, or property in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law.[3]

An orderly proceeding wherein a person is served with notice, actual or constructive, and has an opportunity to be heard and to enforce and protect his rights before a court having power to hear and determine the case[4].

Phrase means that no person shall be deprived of life, liberty, property or of any right granted him

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2. Pennoyer V. Neff, 95 U.S.733, 24 L.Ed. 565
3. Black's law Dictionary.
4. Kazubowski V. Kazubowski, 45 Iii.2d 405,259N.E.2d282,290.

by statue, unless matter involved first shall have been adjudicated against him upon trial conducted according to established rules regulating judicial proceedings, and it forbids condemnation without a hearing.[5]

The concept of "due process of law" as it is embodied in fifth amendment demands that a law shall not be unreasonable, arbitrary, or capricious and that the means selected shall have a reasonable and substantial relation to the object being sought.[6]

Fundamental requisite of "due process" is the opportunity to be heard, to be aware that a matter is pending, to make an informed choice whether to acquiesce or contest, and to assert before the appropriate decision making-body the reasons for such choice.[7]

The essential element of due process of law are notice and opportunity to be heard and to defend in orderly proceeding adapted to nature of case, and the guarantee of due process requires that every man have protection of day in court and benefit of general law.[8]

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5. Pettit V. Penn. La. App., 180SO 2d 66,69
6. U.S.V. Smith, D.C. Iowa, 249 F.Supp. 515,516
7. Trinity Episcopal Corp V. Pomney, DC.N.Y., 387F.Supp 1044
8. Di Maio V. Reid, 132 N.J.L. 17,37 A.2d 829,830.

Daniel Webster defined this phrase to mean a law which hears before it condemns, which proceeds on inquiry and renders judgement only after trial.

This clause has been the most significant single source of judicial review in USA. The word "due" is interpreted as 'just', 'proper' or 'reasonable' according to judicial view. The court may declare a law invalid if it does not accord with its notion of what is just and fair in the circumstances.

TWO ASPECTS OF DUE PROCESS :

There are two aspect of due process.

(1) Procedural Due Process :-

Those safeguards to one's liberty and property mandated by the 14th Amend., U.S. Const., such as the right to counsel appointed for one who is indigent, the right to a copy of a transcript, the right of confrontation.

Central meaning of procedural due process is that parties whose rights are tobe affected are entitled to be heard and, in order that they may enjoy that right,

they must be notified.[9]

(2) Substantive Due Process :-

Such may be broadly defined as the constitutional guarantee that no person shall be arbitrarily deprived of his life, liberty or property; the essence of substantive due process is protection from arbitrary and unreasonable action.[10]

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9. Parham V. Cortese, 407 US.67,92 S.Ct.1983,1994,32 L. Ed 2d 556.

10. Babineau . X V. Judiciary commission, La,341 So 2d 396, 400.

ORIGIN OF THE WORDS "DUE PROCESS"

Because the Barons of England were not vigilant, they were subject to great tyranny by king John. As time passed, they realised that the voices of liberty could not be mute for all time. They realised that the tree of liberty must be refreshed from time to time with the blood of patriotism and tolerance. It is a natural manure. Therefore, in the year 1215, Barons of England at the battle of Runnymede wrung concessions from king John, which came to be embodied in Magna Carta, the great charter of liberties, the bedrock of all freedoms.

The words "due process" have been traced to the famous words of Magna Carta.

"No free man shall be taken or imprisoned or or disseized or outlawed or exiled or in anyway destroyed; nor shall we go upon him nor send upon him but by the lawful judgement of his peers and by the law of the land".[1]

Magna Carta as a charter of English liberty was confirmed by successive English monarch and it is one of these confirmations known as 'Statute of Westminister of the liberties of London' that the expression 'due

1. 39th Chapter of Magna Carta.

process of law' for the first time appears in the following clause.

"That no man of what estate or condition shall be put out of land or tenement nor taken, nor imprisoned nor disinherited nor put to death without being brought in answer by due process of the law."[2]

That expression had its roots in the expression 'Per legem terrae' (law of the land) used in Magna Carta.

In Petition of Right the violation of this statute was urged by averring that contrary to the statute, people had been arrested and detained without any cause shown other than the order of the king.[3]

It is clear that "due process of the law" in England conveyed the idea of arrest or imprisonment according to the law of the land, as opposed to the arbitrary orders of the king or his council, and the procedural safeguards considered necessary in the United States were not a necessary part of the concept in England. In England it is applied only as protection against executive usurpation and royal tyranny.

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2. 28, Edw. III Ch.3.
3. Cls. IV and V of the Petition of Right.

CHAPTER - II

DUE PROCESS IN THE AMERICAN CONSTITUTION

Concept of Due Process came into America as part of the rights of Englishmen claimed by the colonist.

Framers of the American constitution did not put the "Due Process" clause into the original document. The clause was included in the bill of rights and appears in the fifth Amendment adopted in 1791 as a limitation upon the federal power. It provided that.

> "No person shall be deprived of life, liberty or property without due process of law."

A similar limitation upon the states was introduced by the adoption of the Fourteenth Amendment in 1868.

DUE PROCESS AS A RESTRAINT ON LEGISLATIVE POWER

The requirement of 'due process of law' in the United States constitution implies a limitation upon all the powers of Government, legislative as well as executive and judicial. In England it is applied only as protection against executive usurpation and royal tyranny. In America it became a bulwark against arbi-

trary legislation. It is a restraint upon the legislative powers.

The first case in which the supreme count of the United States considered the Due Process Clause of the Fifth Amendment was Murray's Lessee V. Hoboken Land & Improvement Co.[1]

The collector of the Port of New York had been found to owe the United States a large sum of money. In order to recovert this debt, the solicitor of the treasury, by virtue of an act of congress, ordered a federal marshall to sell the property for the collector. The question was whether the property could be proceeded against in that way though the procedure was sanctioned by legislative enactment. Mr. Justice Curtis observed as follows:

> "That the warrant now in question is legal process, is not denied. ----- But is it "Due Process of Law?" The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to

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1. (1856) 18 How. 272

> the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and can not be so construed as to leave congress free to make any process "due process of law", by its mere will. To what principle, then, are we to resort to ascertain whether this process, enacted by congress, is due process? To this the answer must be twofold. We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been enacted on by them after the settlement of this country....."

It was held that tested by the common law of England the proceedings authorised by the Act could not be denied to be due process of law. In this case, the court departed from the meaning of due process as understood in England

and held that it operated as a limitation not only on the executive but on the legislature as well. The object is to protect the citizens against arbitrary and capricious legislation. Hence, it is not within the competence of the Congress to make any process a 'due process of law' by its mere will, for that would make the limitation quite nugatory. It is not any act legislative in form that is law, law is something more than a mere will, exerted as an act of power. It means and signifies the general law of the land, the settled and abiding principles which inhere in the constitution and lie at the root of the entire legal system.

PROCEDURAL DUE PROCESS :

In the case of Murray's due process was regarded as a limitation on procedure rather than on the substance of legislative content. The requirement of due process was deemed to be satisfied so long as the manner of determining individual rights was fair and sound. It is violated when the general law is deviated from. A general law, in the felicitous words of Daniel Webster in his argument in the Dartmout College Case[2] is "a law which hears before it condemns, which proceeds upon inquiry, and renders judgement only after trial. The meaning is, that every

2. Dartmouth College V.Woodward, 1819, 4 Wheaton 518=4L.Ed. 629.

citizen shall hold his life, liberty and property and immunities under the protection of the general rules which govern society". This concept of due process prescribes that legislation involving the taking of life or property must do the taking in conformity with accustomed legal forms and practices. Due process is, thus at once a principle of law - making and a principle of judicial construction where the constitutionality of a law is impugned in the courts. It guaranteed certain protective rights to an accused person before he could be deprived of his life, liberty or property. Its importance in criminal cases is thus manifest. It promised accused persons that they would not be punished in an arbitrary and indiscriminate fashion and vouchsafed them the protection of long established criminal procedure. It thus limited the manner, though not the substance, of governmental action.

The meaning of the expression 'due process of law' has not a definite connotation. It expresses a very elastic conception. The best description of the expression would be, in each particular case such an exercise of the powers of Government as the settled maxims of law permit and sanction. Under such safeguards for the protection of individual rights as those maxims prescribe

for the class of cases to which the one in question belongs.

In spite of the indefiteness of the expression 'due process of law' in the American Constitution, Prof. Wills in his constitutional law of the United States (1936) points out at P662 that 'due process' as a matter of procedure requires certain inherent elements of justice in the determination of questions rahter than that any certain form be used in arriving at the decision. He points out that as recognition of this, were developed as the modern essentials of due process -------

(1) Notice ;
(2) Opportunity, to be heard;
(3) an impartial tribunal; and
(4) an orderly course of procedure.

Thus it could be summed up as the process which is due under jus naturale: principles of natural justice. The two corner stones are:

(1) Audi alteram Partem (Hear the other side)
(2) Nemo judex non causa Sua

(No person can be both a judge and a prosecutor)

When Madison wrote the 'due process' clause into his first draft of the Bill of Rights, he thought of due process only as a procedural gurantee. His view was doubtless that expressed by Hamilton in 1787 on a New York law which contained provisions guaranteeing that no one should be deprived of specified rights except by 'due process of law'. This apparentlywas the first American enactment (Save a 1692 Massachusetts statute) to substitute 'due process of law' for the'law of the land' phraseology originally derived from Magna Carta. "The words 'due process' have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of the legislature" said Hamilton.

Due process had never been defined precisely, but it was associated generally with precedural rights."The generation that fought the civil war usually identified due process with common law procedure".[3] The framers of the Fourteenth Amendment, too, thought that due process of law had "the customary meaning recognized by the counts" which was unquestionably procedural.[4]

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3. Sharles M Hough, "Due Process of Law-Today,"Harvard Law Review, Vol. 32 (1918-19) p. 224

4. Joseph B. James, The framing of the fourteenth Amendment (Urbona: University of Illinois Press, 1956) pp 86-87

SUBSTANTIVE DUE PROCESS

Before 1850 due process was generally assumed to be a procedural rather than a substantive restriction upon governmental authority. When the protection of the constitution had to be invoked for invalidating legislative action encroaching upon proprietary rights and vested interests, Article 1, Section 10 of the constitution relating to the "obligation of contract" clause used to be pressed into service. This "contract clause" was successfully invoked in Fletcher V Peck[5] to strike down a legislative enactment of the state of Georgia. The legislature of that state in 1795 made a grant of certain public lands to James Gunn. This grant was obtained by bribing all the legislators. The property passed through several hands. In 1796 the Act of 1795 was repealed on the ground that its passage had been obtained by bribery of the legislators. The validity of the latter Act was questioned. Marshall, C.J. held:

"A law annulling conveyances between individuals and declaring that the grantors should stand seized of their former estates, notwithstanding those grants, would

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5. (1810) 6 Cranch 87 = 3LEd. 162.

be as repugnant to the constitution, as a law discharging the vendors of property from the obligation of executing their contracts by conveyances."

In Terrett V. Taylor[6] a legislative enactment of the state of Virginia attempting to take title to certain lands of the disestablished Episcopal Church was struck down by Justice Story who held that the contract clause imposed restrictions upon the states legislative authority.

In Dartmouth College V Woodword[7], by an Act of legislature of New Hampshire passed in 1816 the management and application of the funds of a religious and literary institutions, which were placed by the donors in the hands of trustee named in the charters, and empowered to perpetuate themselves, were placed by that Act under the control of the government of the state. The will of the state was substituted for the will of the donors, in every essential operation of the college. It was held that the Act was "Subversive of that contract, on the faith of which property was given "by the donors to the institution.

6. (1815) 9 Cronch 43
7. (1819) 4 Wheaton 518 = 4 LEd. 629.

The early American judges, both Federal and States, appealed to natural rights to the social contract as limiting governmental powers, even apart from any express constitutional restrictions such as the contract clause. In this sense, the different constitutions were treated as declaratory of natural law, and hence as embodiments of universal precepts that were the root of all constitutions.

"Though there may be no prohibition in the constitution" argued Danial Webstor in 1829, "the legislature is restrained from committing flagrant acts, from acts subverting the great principles of republican liberty, and of the social compact". The very nature of society and of government prescribed essential limits upon legislative power. Those limits according to a New York decision in 1849 rested upon the broader and more solid ground of natural rights and were not wholly dependent upon these negatives, contained in the constitution."

Meanwhile the constitutional focus was soon to shift from natural law theories to the express limitations contained in the due process clause. This was primarily the result of several state Court decisions

during the pre-civil war period, notably those of the New York Court of Appeals. The New York cases reflected a steady development of the notion that the rights of the individual were protected by due process from a substantive, as well as procedural, point of view. That development culminated in the celebrated case of Wynehamer V. New York.[8]

The case arose out of a New York law that prohibited the sale of intoxicating liquors except for medicinal purposes and the storage of liquors and not intended for sale in any place but a dwelling house. The law further provided for the immediate summary destruction of all liquors held in violation of its provisions. It also made any violation misdemeanour.

In this notable case, a state law regulating the manufacture of liquor was held invalid on the ground that it violated the due process clause in the state constitution. The state court noted that this clause was to be viewed as a general restriction on the power of the state legislature to interfere with private property.

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8. 13 NY 378 (1856).

The great significance of this case was the New York court used substantive due process as a substitute for the natural law approach.

The Wynehamer decision was recognised as epoch making almost as soon as it was rendered. The reasoning of Wynehamer court, particularly its substitution of substantive due process as a check upon arbitrary governmental power for the prior natural law approach was to be that ultimately adopted by American courts, including the highest bench in the land after ratification of the fourteenth Amendment.

It became a magnificent task for the supreme court of the United States to give meaning and life to this phrase and make it vibrant.

In the words of Alexis De Toogue Ville.

"The Supreme Court is placed higher than any known tribunal. The peace, the prosperity and very existence of the union are vested in the hands of the seven Federal Judges".

In the early years of its history, until about 1850, the Due Process Clause was interpreted as protecting

against unfair procedures only and not against the substance of legislation. In otherwords, it was construed as being merely a procedural rather than a substantive restriction upon governmental action.

It guaranteed certain protective rights to an accused person before he could be deprived of his life, liberty or property. These rights included.

(i) Protection against arrest without warrant,
(ii) right to counsel.
(iii) the requirement of indictment by a grant jury before trial,
(iv) the right of the accused to hear the nature of the evidence against him,
(v) the right to an impartial jury of the accused persons pears, and
(vi) the requirement of a verdict before any sentence was executed.

Due process of law historically was of significance primarily in criminal cases.

The Supreme Court began giving due process a substantive content, using it to invalidate state action interfering with individual freedoms. It was a

period of increasing urbanisation and burgeoning industrialisation. This gave rise to complex social and economic problems. The legislatures responded by passing a series of legislation to regulate private property in the interests of public welfare. The judiciary responded by creating and wielding the sword of substantive due process. Acting as a kind of super legislature or a "negative third Chamber" the supreme court, reviewed scores of state and federal, Social, and Economic legislation and struck them down as being violative of substantive due process. "Reasonableness" became the Keyword. Legislation which passed the court's test of reasonableness was upheld. The problem however, was that the court possessed no accurate yardstick to measure's 'reasonableness". There was no handy external measuring standard. There was no handy specific constitutional provision or absolute principle of law. The court therefore, used a subjective approach making due process a fluid, flexible and sometimes nebulous concept. Obviously this provoked much criticism:

> A reasonable law was one that seemed sensible, plausible, and intelligent to the judges wo passed upon it. What can constitute sensible,

> plausible and intelligent public policy, however, is largely a matter of the individuals economic and social philosophy his standard of values. When the court applied the test of reasonableness to legislation, it measured the law against its own economic and social attitudes. If in the light of these attitudes, the law seemed intelligent, the justices upheld it, if not, they declared it unreasonable, arbitrary and a violation of due process of law. There was often a capricious element in such judgement.[9]

In effect, the court when it invalidated legislation as being violative of due process, was substituting its own social and economic philosophy for that of the legislature. Initially the court followed a laisses faire philosophy, severely curtailing the regulatory power of the state in the interest of freedom of contract and business growth free of governmental interference.

In Lochner V New York[10], the court invalidated a New York statute regulating hours of labour of bakers. The statuteplaced a maximum limit of sixty hours of

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9. The American constitution, Its origins and development
10. 198 U.S. 45 (1905).

labour in one week or ten hours in any one day. It was a 5-4 decision, with the majority feeling that the statute exceeded the permissible limits of state regulatory power and would result an intolerable impairment of the freedom of contract. Justice Holmes dissenting opinion is of importance not only for its effective attack upon the laissez faire appreach used by the court, but because the principles enunciated therein were later adopted by the court. Justice Holmes wrote:

> "This case is decided upon an economic theory which a large part of the country does not entertain ---------- a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel and even shocking, ought not be conclude our judgement upon the question whether statutes embodying them conflict with the constitution of the United States."

Adoption of Justice Holme's views led to an era of jidicial self restraint in the years between 1937 and 1953. Substantive due process was no longer used by the court to curb state economic legislation. However substantive due process did remain alive and well in the area of civil liberties.

After 1953 the Warren Court launched into an era of judicial activism, breathing life into the concept of substantive due process and using it with renewed vitality. There was, however, a great difference in the way it was being used. The tool was still 'Substantive due process', but in the hands of the Warren court its accomplished ends dramatically different from those of the conservatives of lochner era.

This reveals what a powerful concept substantive due process is what a dangerous double edged sword it can be since it can be used both to expand the guarantees of individual rights as well as to cut back on them.

CHAPTER - III

LEGISLATIVE HISTORY OF ART 21 VIZ DRAFT ART. 15.

Draft Art. 15 as originally passed by the Constituent Assembly, provided that "No person shall be deprived of his life or liberty without due process of law." The Drafting committee suggested two changes in this Article.

(i) the addition of the word "personal" before the word "liberty" and

(ii) the substitution of the expression "except according to procedure established by law" for the words "without due process of law".

ARGUMENT IN SUPPORT OF 'DUE PROCESS'

Mr. Kazi Syed Karimuddin opposed these amendments and said if the proposed amendment by the Drafting Committee was accepted and article was allowed to stand as[1]

> "No person shall be deprived of his life or personal liberty except according to procedure established by law---"

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1. CAD Volume VIIth 1948-49 p.842-843.

Then in his opinion it would open a sad chapter in the history of constitutional law. He supported the suggestion of the Advisory Committee on Fundamental Rights appointed by the constituent Assembly that no person shall be deprived of his life or liberty without due process of law; and he really did not understand how the words "personal and according to procedure established by law had been brought into article 15 by the Draft committee.

He further argued if the words "according to procedure established by law" are enacted, there will be very great injustice to the law courts in the country, because as soon as a procedure according to law is complied with by a court, there will be an end to the duties of the courts and if the court is satisfied that the procedure has been complied with, then the judges can not interfere with any law which might have been capricious, unjust or iniquitous. He wanted to provide guarantee to individuals inalienable rights in such a way that the political parties that come into power can not extend their jurisdiction in curtailing and invading the fundamental rights laid down in the constitution. Therefore, he submitted that the words "except according

to procedure established by law" be deleted and then that the words "without due process of law" be inserted.

Mr. Mahbub Ali Baig Sahib Bahadur moved "that in article 15 for the words "except according to procedure established by law" the words, "save in accordance with law" be substituted."[2]

In the note given by the Drafting committee it was stated that they made two changes. The first is the insertion of the word 'personal' before liberty, and the reason given is that unless this word personal finds a place there, the clause may be construed very widely so as to include even the freedoms already dealt with in art. 13.

As regards why the original words "without due process of law" were omitted and the present words "except according to procedure established by law" are inserted, the reason is stated to be that the expression is more definite and such a provision finds place in Art. 31 of the Japanese Constitution of 1946.

Mr. Mahboob Ali argued, "It is no doubt true that in Japanese constitution art. 31 reads like this

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2. CAD Vol. VII 1948-49 p 844.

but if the other articles that find place in the Japanese constitution (VIZ, Arts. 32,34 and 35) had also been incorporated in this Draft constitution that would have been a complete safeguarding of the personal liberty of the citizen. This Draft constitution has conveniently omitted those provisions."[3] Art. 32 of the Japanese constitution provides that "no person shall be denied the right of access to the court." According to present expression it may be argued that the legislature might pass a law that a person will have no right to go to a court of law to establish his innocence. But according to the Japanese constitution art. 32 clearly says that "no person shall be denied the right of access to the court. But there is no such a corresponding provision in the Draft constitution.

Art. 34 of the Japanese constitution provides that "No person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of counsel, nor shall be detained without adequate cause and upon demand of any such person such cause should be immediately shown in open court in his presence and in the presence of his counsel." Such a clear right has not been given in these draft provisions.

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3. Id at p 844.

Further Art 35. provides that the right of all persons to be secured in their homes and against entry, searches etc. shall not be impaired, except upon warrant issued only for probable cause and so on. If for the sake of clarity and definiteness the Draft constitution article had imported Art. 31 of the Japanese constitution it should in fairness have incorporated the other articles of the Japanese constitution, which are relevant and which were enacted for safeguarding the personal liberty of the honest citizen.

Mr. Mahboob Ali argued[4] that the expression "except according to procedure established by law" covers the point but the expression means "procedure established by law" of the legislature and it will competent for the legislature to lay down a provision that in the matter of detention of person whether for political or other reasons, the jurisdiction of the court is ousted. The only extent to which the courts can go is to find out whether there is bonafides or mala fides for the action of the government, and the burden is laid upon the person to prove that there is mala fides on the part of the government in having issued a warrant of detention or arrest . Therefore the words "except according to pro-

4. Id at p. 845

cedure laid down by law" would mean and according to him it does mean, that the future legislature might pass a law by which the right of a citizen to be tried by a court to establish his innocence could be taken away. If the words "except according to procedure established by law" do not deprive a person of his right to go before the court and establish his innocence and he is not prevented from such a course, then it will be another matter. But the words "without due process of law" have been held in England and other countries to convey the meaning that every citizen has got the right, when an action has been taken, against him depriving him of his personal liberty, to go before the court and say that he is innocent. That right is given under the expression "without due process of law" or "save in accordance with law".

The expression except according to procedure established by law" was objected on the above grounds.

Pandit Thakur Das Bhargava[5] also supported the expression "without due process of law" and delivered his arguments.

He argued that by using the words "without due

5. Id at p 846

process of law" the courts may be authorised to go into the question of the substantive law as well as procedural law when an enactment is e acted, the courts will have right to go into the question whether a particular law enacted by parliament is just or not, whether it is good or not, whether as a matter of fact it protects the liberties of the people or not. If the supreme court comes to the conclusion that it is unconstitutional that the law is unreasonable or unjust then in that case the courts will hold the law to be such and that law will not have any further effect.

As regards procedure also, if any legislature takes it into its head to divest itself of the ordinary rights of having a good procedural law in this country, to that extent the court will be entitled to say whether the procedure is just or not.

It was argued by the drafting committee that the words 'due process of law' are not certain or clear. In reply Pandit Thakur Das said that what is the exact meaning of the word morality put in this constitution, is not clear, and many other words used in this constitution have an uncertain meaning. The words decency and morality

have not got a definite meaning. Therefore if words "due process of law are carried they will constitute the bed rock of our liberties. This will be a magna carta. This is only victory for the judiciary over the autocracy of the legislature. In fact two bulwarks are needed for our liberties. One is the legislature and the other is the judiciary. But even if the legislature is carried away by party spirit and is sometimes panicky the judiciary will save from the tyranny of the legislature and the executive.

Shri Chimanlal Shah also supported the expression 'due process of law'. According to his argument[6] the words 'without due process of law' have been taken from the American constitution and they have come to acquire a particular connotation. That connotation is that in reviewing legislation, the court will have power to see not only that the procedure is followed, namely, that the warrant is in accordance with law or that the signature and the seal are there, but it has also the power to see that the substantive provisions of law are fair and just and not unreasonable or oppressive or capricious or arbitrary. That means that the judiciary is given power to review legislation. In America that kind of power which has been

6. Id at p. 848

given to the judiciary undoubtedly led to an amount of conservative outlook on the part of the judiciary and to uncertainty in legislation. But our article is in two respects entirely different from the article in the American constitution. In the American constitution the words are used in connection with life, liberty and property. But in this article the word property has been omitted, becaue on account of the use of this word in the American constitution there has been a good deal of litigation and uncertainty. There has been practically no litigation and no uncertainty as regards the interpretation of the words "due process of law" as applied to life and liberty.

Secondly the word personal has been added before liberty and it has been made 'personal liberty' to make it clear that this article does not refer to any kind of liberty of contract or anything of that kind, but relates only to life and liberty of person. Therefore it would be wrong to say that the words 'due process of law are likely to lead to any uncertainty in legislation or unnecessary interference by the judiciary in reviewing legislation.

Shri Krishna Chandra Sharma also supported the expression 'due process of law'. According to him[7] this article guarantees the personal liberty and life of the citizen. In democratic life, liberty is guaranteed through law, Democracy means nothing except that instead of rule by an individual, whether a king or despot, or a multitude, we will have the rule of the law. The term 'due process of law' has a necessary limitation on the powers of the state, both executive and legislative. The doctrine implied by "without due process of law" has a long history in Anglo American law. It does not lay down a specific rule of law but it implies a fundamental principle of justice. These words have nowhere defined either in the English constitution or in the American constitution but their meaning can be traced through reading the various antecedents of this expression. What this phrase means is to guarantee a fair trial both in procedure as well as in substance. The procedure should be in accordance with law and should be appealable to the civilised conscience/of the community. It also ensures a fair trial in substance, that is to say, that substantive law itself should be just and appealable to the civilized conscience of the community.

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7. Id at p. 850

REASONS FOR SUBSTITUTING "PROCEDURE ESTABLISHED BY LAW" FOR "DUE PROCESS OF LAW".

Substantive due process and procedural due process were well established in the United States, and though the concept of'due process' was vague and flexible it was used to enforce certain standards to which according to majority of the judges of the U.S. Supreme Court substantive and procedural laws had to conform. However, the abuse of substantive due process by the U.S. Supreme court produced second thoughts, and "due process" was replaced by "procedure established by law". This change was the result of a discussion which the constitutional advisor, Sir, B.N. Rao had with Mr. Justice Frankfurter of the U.S. Supreme Court.

Sir B.N. Rau, the then constitutional Advisor to the constituent Assembly was advised by Mr.Justice Frankfurter of the U.S. Supreme Court Against adopting due process in the Indian constitution. For the original intention of the makers of the American constitution, according to Frankfurter, was to use due process as a procedural safeguard only. But the U.S. Supreme Court

enlarged it into a substantive safeguard also. That made the judicial reveiw, according to Frankfurter, undemocratic; because the court could strike down the policies of the government even by taking the stand that they were substantively opposed to the provisions of the constitution. Justice Frankfurter after an initial period of liberalism inherited from his professorship became a conservative as to t he scope of judicial review. He became the principal advocate of judicial restraint in respect of questions governed by legislative policies and would rather restrict judicial review to procedural grounds. Sir B.N Rau also had a background of being a distinguished civil servant before he became a High Court Judge. He was easily persuaded to Frankfurter's views and advised the constituent Assembly to substitute the expression "according to procedure established by law" in place of expression "according to due process of law".

CHAPTER - IV

INTERPRETATION OF PHRASE 'PROCEDURE ESTABLISHED BY LAW' IN GOPALAN CASE

Art. 21 lays down that no person shall be deprived of his life or personal liberty except according to procedure established by law.

This Article employs the same language as Article 31 of the Japanese constitution of 1946, which stated:

"No person shall be deprived of life and liberty, nor shall any other criminal penalty be imposed except according to procedure established by law."

It is also akin to the Fifth and Fourteenth Amendments of the U.S. Constitution. However, the phraseology there-under has also been hitherto is 'due process of law'. For the first time, the question arose in Gopalan[1] case as to what exactly is the meaning of 'procedure established by law'.

The petitioner Gopalan moved the Supreme Court

1. A.K. Gopalan V. Madras, AIR 1950 SC 27

by a petition under Art. 32. of the constitution. He was under preventive detention since before the commencement of the constitution under the Madras Maintenance of Public Order Act, 1947. After enactment of preventive detention Act by the first parliament in 1950 a fresh order of detention was passed to keep him under detention uninterruptedly. He prayed for a writ of habeas Corpus on the ground that the detention order was illegal and void, having been passed under the preventive detention Act which, he urged, was unconstitutional for reasons of being "in contravention" of Art. 13(2). He contended that it "takes away or abridges the rights" under part III in general, and under Articles 21-22 and Art. 19 of the constitution, in particular.

The main contention before the supreme court was that the expression "procedure established by law" corresponded to the phrase "due process of law" in the fifth and fourteenth Amendment of the U.S. Constitution. Therefore, it must be understood in the same manner and flexible sense so as to comparable broadly the fundamental principles of natural justice. On behalf of Gopalan, an attempt was made to persuade the supreme court to hold that the courts could adjudicate upon the

reasonableness of the preventive detention Act, or for that matter, any law depriving a person of his personal liberty. A three pronged argument was developed for this purpose:

(1) The word 'law' in Art.21 does not mean merely enacted law but incorporates principles of natural justice so that a law to deprive a person of his life or personal liberty can not be valid unless it incorporates these principles in the procedure laid down by it.

(2) The reasonableness of the law of preventive detention ought to be judged under Art. 19.

(3) The expression 'procedure established by law introduces into India the American concept of procedural due process which enables the courts to see whether the law fulfils the requisite elements of a reasonable procedure.

Thus, in Gopalan, an attempt was made to win for a detenu better procedural safeguards than were available to him under the relevant law and Art.22. But the attempt failed as the Supreme Court rejected all these arguments.

Shri M.C. Setalvad, the learned Attorney - General, appearing for the Union of India, the intervener , submitted that Act was not invalid. It did not abridge any of the alleged rights of the petitioner. He urged that the guarantee of procedure established by law was a protection of nothing more than procedure prescribed by any law made by a competent legislature. The constituent Assembly had rejected the "due process" clause, and all that was meant by it under the American Constitution. The word 'law' in Art. 21 meant the enacted law, and not jus; natural law. The court had no power of judicial review as claimed by the American Supreme Court under due process clause.

The special constitution Bench, which heard the petition, consisting of Kania C.J., and Fazel Ali, Sastri, Mahajan, Mukherjee and Das JJ. dismissed the petition by majority(Fazel Ali dissentinting). It declared the preventive detention Act valid, except section 14.

The court held by majority that the word 'law' in Art. 21 could not be read as meaning rules of natural justice. These rules were vague and indefinite and the constitution could not be read as laying down a vague

standard. Nowhere in the constitution the word 'law' was used in the sense of abstract law or natural justice The word 'law' was used in the sense of lex (state made law) and not jus. The procedure established by law would therefore mean the procedure as laid down in an enacted law.

Delivering his judgement Kania C.J. said[2]

"No extrinsic aid is needed to interpret the words of Art.21, which in my opinion, are not ambiguous. Normally read, and without thinking of other constitutions, the expression "procedure established by law " must mean procedure prescribed by the law of the state.

> If the Indian constitution wanted to preserve to every person the protection given by the due process clauss of the American constitution there was nothing to prevent the Assembly from adopting the phrase or if they wanted to limit the same to procedure only to adopt that expression with only the word 'procedure' prefixed to 'law'."

It was contended in Gopalan that the expression 'procedure established by law' in Art.21 was synonymous

2. AIR (1950) SC Supra at 139.

with the American concept of 'procedural due process' and, therefore the reasonableness of the preventive detention Act, or for that matter, of any law affecting a person's life or personal liberty should be justiciable in order to assess whether the person affected was given a right of fair hearing. The court rejected the contention giving several reasons. First the word 'due' was absent in Art. 21. This was a very significant omission for the entire efficacy of the procedural due process concept emanated from the word 'due'. Secondly the draft constitution had contained the words due process of law' but these words were later dropped and the present expression adopted instead. This was strong evidence to show that the constituent Assembly did not desire to introduce into India the concept of procedural due process. This was done mainly to avoid the uncertainty surrounding the due process concept. The judicial decisions in the U.S.A. On what was reasonable had not been uniform. The concept of 'reasonable' had varied from judge to judge, statue to statue, time to time and subject to subject. Thirdly the American doctrine generated the countervailing, but complicated, doctrine of police power to restrict the ambit of due process, i.e. the doctrine of governmental power to regulate private rights in public interest. If

the doctrine of due process were imported into India then the doctrine of police power might also have to be imported which would make things very complicated.

Delivering his judgement Kania CJ observed;[3]

> "To read the word 'law' as meaning rules of natural justice will land one in difficulties because the rules of natural justice, as regards procedure, are no where defined and in my opinion the constitution can not read as laying down a vague standard. This is particularly so when in omitting to adopt "due process of law" it was considered the expression "procedure established by law" made the standard specific. It can not be specific except by reading the expression as meaning procedure prescribed by the legislature. The word law as used in this part has different shades of meaning but in no other Article it appears to bear the indefinite meaning of natural justice. If so, there appears no reason why in this Article it should receive this peculiar meaning."

Shastri J. Thought that Art. 21, like its American prototype in the 5th and 14th amendments, presented an

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3. ibid

example of fusion of procedural and substantive rights in the same provision. The first and essential step in the procedure established by law must be a law made by a competent legislature, authorising deprivation of personal liberty or life. He was unable to agree that the 'law' in this context mean the immutable and universal principle of natural justice, because, his strong belief in the principle of parliamentary supermacy principle. he said;[4]

> "The procedure established by law must be taken to refer to a procedure which has a statutory origin, for no procedure is known, or can be said to have been established by such vague and uncertain concepts as the immutable and universal principles of natural justice."

Law, he clearly maintained meant positive or state made law.

Giving full effect to above principles he observed;[5]

> "I am unable to agree that the term 'law' in Art.21 means the immutable and universal principles of natural justice."

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4. AIR (1950) Sc at p72
5. ibid

Mukherji J. said that the constitution was supreme, and a man could not be deprived of his personal liberty unless the state acted according to the codified law which provided for deprivation of such liberty. The word procedure meant the manner and form of enforcement of the law. Of course in order that there might be a valid law, the legislature should be competent to enact it in accordance with Art.246 of the constitution by reference to any of the items in the legislative lists. It was also necessary that a law must not offend against the fundamental rights. The word 'due' had been deliberately omitted. The word 'established' ordinarily meant 'fixed or laid down'. with the user of the expression "natural law or natural justice" it would not be appropriate to use the word established. The word 'law' accordingly had been used in the sense of the state made law, and was not equivalent to the law in the abstract or general sense embodying the principles of natural justice.

Enunciating this principle Mukherji J. concluded;[6]

" My conclusion, therefore, is that in Art.21 the word 'law' has been used in the sense of state made law and not as an equivalent of law in the abstract or general sense embodying the principles

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6. ibid at p. 103

of Natural, justice. The Article presupposes that the law is a valid and binding law under the provisions of the constitution having regard to the competency of the legislature and the subject it relates to and does not infringe any of the fundamental rights which the constitution provides for."

Das J. stated that Art. 21 defined the substantive fundamental right to which protection was given, and did not purport to prescribe any particular procedure at all. The right to life and personal liberty which was protected was not an absolute right. It was a qualified right - a right circumscribed by the possibility, or risk of being lost according to procedure established by law. The power of deprivation was exercisable by procedure established by law. This clause was in the nature of a limitation. It delimited the right by the insistency of the condition of deprivation of personal liberty only according to procedure established by law, and threw the obligation on the state to follow a legal procedure in the matter. What that procedure would be was indicated only in Art. 22. The word "prodedure" should be taken to signify some step, method, manner or course of proceeding leading up to the deprivation of life or personal liberty. The word "established" in its

ordinary natural sense meant "enacted" or "established by law". It meant "enacted by law". If this was accepted, the word 'law' could not possibly mean the principles of natural justice. The procedure established by law must be procedure enacted by the state, which by definition of Art.12 included parliament. There was no escape from this position, if the cardinal rule of construction, namely, to give the words used in a statue their ordinary natural meaning was applied. The procedure established by law was quite compatible with the procedure enacted by law.

To quote Das J.[7]

> "Apart from the question whether any rule of natural procedure exists which conforms to the notions of justice and fair play of all mankind at all times, it has to be ascertained whether the language of Art.21 will permit its introduction into our constitution. The question then arises as to what is the meaning of the expression "procedure established by law". The word 'procedure' in Art, 21 must be taken to signify some step or method or manner of proceeding leading up to the deprivation of life or personal liberty. According

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7. ibid p-114

> to the language, used in Art, this procedure has to be 'established by law'. The word'established' in its ordinary natural sense means, amongst other things "enacted". "Established by law" will, therefore mean 'enacted by law'. If this sense of word "established is accepted then the word 'law' must mean state made law and can not possibly mean the principles of natural justice, for no procedure can be said to have been "enacted" by thoseprinciples."

Mahajan J. said that the declaration contained in the preamble made the constitution sublime, and the guarantees mentioned in the chapter on fundamental rights made it one of the greatest chapters of liberty. Nevertheless, it was quite obvious that the court could not declare a statute unconstitutional and void simply on the ground of unjust and oppressive, or because, it was supposed to violate natural, social or political rights of citizens unless it could be shown that such injustice was prohibited or such rights were guaranteed and protected by the constitution. It could not also be declared void, because, in the opinion of the court, it was opposed to the spirit supposed to pervade the constution, although not expressed in words,

It is difficult on any general principles to limit the omnipotence of the sovereign legislative power by judicial interposition, except in so far as the express words of the constitution gave that authority.

Fazel Ali J. delivered a strong dissent in the name of liberty and ffeedom cherished by the man. He read the constitution as it was, and he understood it in the sense given out by its words. He did not recognise any overriding considerations inferrable from any general statement of the Drafting committee, or the constituent Assembly Debate. He wished to articulate an authoritative exposition of the meaning of the words, and felt that no overriding consideration could compel the court to put a meaning opposed to reason and authority. He would not be deterred from giving effect to a fundamental right granted under the constitution merely, because, avague andunfounded fear that some catastrophe might occur .

Fazel Ali J. disagreeing with the majority view held that the principle of natural justice that 'no one shall be condemned unheard' was part of the general law of the land and the same should accordingly be read into Art.21. Procedure established by law must include the principles that

no person should be condemned without a hearing by an impartial tribunal, whatever else, it might , or might not include. The word 'law' used in Art.21 did not mean only the enacted law. This was clear from the fact that though no statute laid down the complete procedure to be adopted in contempt cases, yet such procedure as applied by the court prevailed as part of our law. He was aware that some judges have expressed a strong dislike for the expression, "natural justice" on the ground that it was too vague and elastic. He said that these were known principles with no vaguness about them and existed as all systems of law respected and recognised them. They could not be disregarded merely, because, they were in the ultimate analysis found to be based on "natural justice". As insisted that procedure established by law would include the cardinal principle: audialteram partem.

While dissenting he stated[8]

"The questioh is whether the principle that no person can be condemned without a hearing by an impartial tribunal which is well recognised in all modern civilized systems of law and which Halsbury puts on a par will well recognised fundamental right

8. ibid at p 60

can not be regarded as part of the law of this country. I must confess that I find it difficult to give a negative answer to this question. The principle being part of the British system of law and procedure we have inherited, has been observed in this country for a very long time. If that is so then procedure established by law must include this principle, whatever else it may or may not include. That the word 'law' used in Art.21 does not mean only state-made law is clear from the fact that though there is no statute laying down the complete procedure to be adopted in contempt of court cases, when the court is not with in the view of the court, yet such procedure as now prevails in these cases is part of our law."

The procedure established by law is, as was agreed by Kania C.J, Mukherji and Das J.J. among those forming the majority in the Gopalan, the procedure enacted by parliament, or a state legislature. The word 'procedure' used in the clause means the manner and form of enforcement of law; and the word 'established' should be taken to mean 'fixed' or 'laid down' by legislative prescription. Explaining the concept of the guarantee of procedure esta-

blished by law,Mukherji J, observed that a plain reading of the clause leads to the conclusion that the state can not deprive a man of his personal liberty unless it chooses to follow, and actually acts according to law, which provides for deprivation of life and personal liberty. In the context a law is a validly enacted law by parliament, or by a state legislature under Art.246 read with the appropriate legislative list entries, given in the seventh shedule. Mahajan J. thought that the clause required the existence of a substantive law as a condition precedent to any action affecting the life or liberty of an individual. There must exist a substantive law, conferring authority upon the Government to deprive an individual of his life or personal liberty; and it must also provide for a mode or procedure for such deprivation.

But Fazel Ali J. laid emphasis on certain basic principles e.g. the principle that no one should be condemned without a hearing by an impartial tribunal. The word 'law' he added, "does not include only state made law".

RELATION BETWEEN ARTS.21, 22 AND 19

An attempt was made by petitioner in Gopalan to establish a link between these three Arts. The purpose

was to persuade the court to adjudge the reasonableness of the preventive Detention Act. It was therefore argued that when a person was detained, his several rights under Art.19 (except the right to hold property under Art. 19(1) (f) were affected and thus the reasonableness of the law, and the procedure contained therein, should be justiciable with reference to Art. 19(2) to (6). Rejecting the argument, the court pointed out that the word 'personal liberty' in Art. 21 in itself had a comprehensive content and ordinarily if left alone, would include not only freedom from arrest or detention, but also various freedoms guaranteed by Art.19. However reading Arts. 19 and 21 together, Art. 19 must be held to deal with a few specific freedoms and not with freedom from detention whether punitive or preventive. Similarly, Art.21 should be held as excluding the freedoms dealt with in Art.19. The court ruled that Art.20 to 22 constituted a comprehensive code and embodied the entire constitutional protection in relation to life and personal liberty and was not controlled by Art.19. Thus a law depriving personal liberty had to conform with Arts.20 to 22 and not with Art.19, which covered a separate and distinct ground. Art.19 could be invoked only by a freeman and not one under arrest. Further Art.19 could be invoked

only when a law directly attempted to control a right mentioned therein. Therefore a law directly controlling a citizen's freedom of speech could be tested under Art. 19(2). But Art. 19 could not be invoked when a law not directly in respect of a right mentioned therein infringed a right guaranteed by Art. 19. This judicial approach meant that a preventive detention law would be valid and be within the terms of Art. 21 so long as it conformed with Art. 22 and it would not be required to meet the challenge of Art. 19. Fazel Ali J, differing with the majority, held that Art. 19(1)(d) did control Arts. 21 and 22, because juridically freedom of movement was an essential requisite of personal liberty, and, therefore, the reasonableness of the preventive Detention Act should be justiciable under Art. 19.

When A.K. Gopalan, a communist leader was detained under the Preventive Detention Act in 1950 he chanllenged the constitutionality. It was in that case the scope of 'procedure established by law' came to be determined. In view of the historic pronouncement of the Supreme court in Gopalan's Case[9], it became the settled position that law would include every law, even the rules of procedure for enforcement of the powers, privileges and immunities of the state legislature.

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9. A.K. Gopalan VS State of Madras AIR (1950) SC 27

In M.S.M. Sharma,[10] it was held that if a citizen of India is deprived of his personal liberty as a result of the proceedings before the committee of privileges, such deprivation will be in accordance with procedure established by law and can not complain of the breach, actual or threatened of his fundamental right under Art.21.

Down the years the same interpretation held in the sway.

In Ram Chandra Prasad,[11] a construction Engineer accepted a sum of Rs.10,000/- as illegal gratification from a contractor carrying on business under the name and style of Hindustan Engineering and construction company.

The courts disbelieved the defence that he had taken the envelope containing this amount not knowing that it contained papers relating to contract. The constitutionality of sec.4. of the prevention of corruption Act was questioned as violative of Art.21 of the constitution. Relying upon Gopalan's case Supreme court observed.[12]

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10. MSM Sharma VS Sri Krishna Sinha AIR 1959 SC 395
11. Ramchandra Prasad V. Stateof Bihar AIR 1961 SC 1629
12. ibid

"the word 'law' has been used in the sense of state-made law and not as an equivalent of law in the abstract or general sense embodying the principles of natural justice, and 'procedure established by law's means law made by the state, that is to say,by the union parilament or the legislature of the states, Sec. 4 has been enacted by parliament and thereforeit must be held that what it lays down is a procedure established by law."

In Rati Lal Bhanji [13] the appellant alongwith other persons was being tried for an offence u/s. 120 of the IPC read with Sec.167 (81) of the Sea Customs Act, 1878 and Sec.5 of the Imports and Exports control Act, 1947. The offence was bailable. However, later the High Court of Bombay in exercise of its inherent jurisdiction cancelled the bail orders and directed him to surrender to his bail.

The question arose whether the deprivation of personal liberty by cancelling the bail of the accused was violative of Art. 21. The Supreme Court relying upon Gopalan's case held that the inherent powers of the High Court conferred under Sec.561A of Cr.P.C.(a pre-constitutional law), were preserved even after the constitution. Such an

13. Rati Lal Bhanji V. Asstt. Customs Collector Bombay AIR 1967 SC 1939.

inherent power is vested in the High Court by the law within the meaning of Art. 21. The procedure for invoking the inherent powers is regulated by the rules framed by the High Court. The power to make such rule is conferred by the constitution under Art. 225. The previous rules were continued to be in force by the bail and depriving the appellant of his personal liberty is according to 'procedure established by law'. Therefore there is no violation of Art. 21.

In Govind[14] the petitioner alleged that several false cases had been filed against him in criminal courts by the police. However, he was acquitted in all, but two cases. On that basis it was said that he was a habitual offender and police had opened a histoy sheet against him and he had been put under surveillance.

The petitioner also stated that police were making domiciliary visits both by day and by night at frequent intervals. His house was secretly picketed by police. His movements were watched by the patel of the village. Whenever police came to the village he was harrassed. The result was, his reputation had sunk in the estimation of his neighbours. The actions of the police, according to

14. Govind V. State of M.P. AIR 1975 SC 1378

the petitioner, were violative of his fundamental rights, including Art.21. Therefore he contended that Regulations B55 and B56 of the M.P. Police Regulations providing for surveillance were unconstitutional.

But the Supreme court held,

" Depending on the character and antecedents of the person subjected to surveillance as also the objects and the limitations under which surveillance is made, it can not be said surveillance by domiciliary visits could always be unreasonable restriction upon the right of privacy. Assuming that the fundamental rights explicitly guaranteed to a citizen have penumberal zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest. As regulation B56 has the force of law, it can not be said that the fundamental right of the petitioner under Art.21 has been violated by the provisions. Contained in it, for, what is guaranteed under that Art.is that no person shall be deprived of his life or personal liberty except by the procedure established by law."

An important question arose in State of U.P.V.Poosu[15] whether an order directing the re-arrest and detention of of an accused who had been acquitted by the High Court was violative of Art.21. It was held that it did not in any way offend Art.21. Because such an order was made in exercise of its plenary jurisdiction conferred under Arts. 136 and 142 of the constitution. By no stretch of imagination could it be said that such an order deprived the accused of his liberty in a manner otherwise than in accordance with law.

The correctness of the law laid down in Gopalan's case was never seriously doubted by any judgement of the supreme court till in R.C. Cooper V. Union,[16] an eleven judge bench. "reconsidered Gopalan's case and held by a majority of 10:1 that it was wrongly decided becuase the majority in Gopalan treated the fundamental rights conferred by various articles as mutually exclusive, hence in Bank nationalization case the rigid judicial view was somewhat softened and a new trend began to emerge. After this case, it could be legitimately argued that if Art. 19(1)(f) was linked with Art.31(2), then there was no reason why Art.19 could not be linked with Arts.21 and 22. The supreme court recognised the force of this logic when it declared in Sambhu Sarkar[17] that the approach of the

15. State of U.P.V. Poosu AIR 1976 SC 1750.
16. AIR (1970) 3 SCR 530
17. SambhuNath Sarkar V. West Bengal AIR 1973 SC 1425

court in Bank Nationalization case had held the major premise of the majority in Gopalan to be incorrect.

In another major development from this point of view, in the Bennett Coleman[18] case the court overruled the argument that Art.19(1)(a) could not apply to a law affecting freedom of speech but not enacted directly with respect to Art.19(1)(a). The court declared that if a law affected freedom of speech, its reasonableness became assessable with reference to Art.19(2) eventhough it was not enacted directly to control the freedom of speech. This completely knocked out the courts earlier argument in Gopalan that Art.19 applied only when a law was passed directly in respect of a matter falling under it, and not when a law not directly in respect of a right under Art.19, still abridged such a right.

Thus hitherto the marked distinction between "due process clause " and "the procedure established by law" had been maintained throughout. However, for the first time, in Bank Nationalization case the pendulam swung from "procedure" to "due process".

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18. Benett Coleman & Co. V India AIR 1973 SC 106

CHAPTER - V

CHANGING CONCEPT OF PHRASE 'PROCEDURE ESTABLISHED BY LAW' IN

MANEKA GANDHI[1]

It is a landmark case of the post-emergency period. This case shows how liberal tendencies have influenced the Supreme court in the matter of interpreting fundamental rights, Particularly Art.21. A great transformation have come about in the judicial attitude towards the protection of personal liberty after the traumatic and bitter experience of the emergency during 1975-77 when personal liberty had reached its nadir. Since then the Supreme Court has shown great sensitivity to the protection of personal liberty. The court has re-interpreted Art.21 and practically overruled Gopalan.

Maneka's passport was impounded in 'public interest' by an order dated July 2, 1977. The Government of India declined 'in the interest of general public' to furnish the reasons for its decisions. Thereupon she

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1. Maneka Gandhi V. Union of India (1978)1 SCC 248

filed this writ petition under Art.32 of the constitution to challenge that order. The challenge was founded on the following grounds

(1) To the extent to which S-10(3)(c) of the passports Act, 1967, authorises the passport authority to impound a passport 'in the interest of general public', it is violative of Art.14 of the constitution since it confers vague and undefined power on the passport authority.

(2) Sec.10(3)(c) is void as conferring an arbitrary power since it does not provide for a hearing of the holder of the passport before the passport is impounded.

(3) Sec.10(3)(c) is voilative of Art.21 of the constitution since it does not prescribe 'procedure' within the meaning of that article and if it is held that procedure has been prescribed, it is arbitrary and unreasonable.

Five separate judgements were delivered, namely by Beg CJ., by Chandrachud J., by Bhagwati J., for himself and Untawalia and Fazel Ali JJ., by Krishna Aiyer J., and by Kailasan J.

The leading opinion in Maneka was propunded by Justice Bhagwati. The court laid down a number of

proposition seeking to make Art.21 much more meaningful than hitherto.

Maneka was believed to have resurrected American procedural due process in Art.21 which was freed from the confines of Gopalan[2] on 'procedure' Maneka told us that if a law depriving a person of his life or personal liberty and prescribing a procedure had to stand the test of one or more fundamental rights conferred under Art. 19 which may be applicable in a given situation, ex hypothesi it must also be liable to be tested with reference to Art.14. The court drew its sustenance from the observation of Justice Fazl Ali in Gopalan who spoke in favour of a procedure which included certain principles of natural justice and which was not arbitrary, fanciful or oppressive.[3] According to Maneka, a "procedure" could no more be a mere enacted or state prescribed procedure as laid down in Gopalan but had to be a fair, just and reasonable procedure. The most notable and innovative holding in Maneka, as observed by Bhagwati J. was that

"the principle of reasonableness which legally as well as philosophically is an essential element of equality or non arbitrariness pervades Art.14 like a

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2. A.K.Gopalan VS state of Madras AIR (1950) SC.27
3. Supra n.1 at 283

brooding omnipresence, and the procedure contemplated by Art.21 must answer the test of reasonableness in order to be in conformity with Art 14."[4]

Further according to Maneka, even on principle the concept of reasonableness must be projected in the procedure contemplated by Art.21 having regard to the impact of Art.14 or Art.21 and, therefore, Bhagwati J. added

> "the procedure must be a right, just and fair and not arbitrary, fanciful or oppressive."[5]

Therefore the court reiterated the proposition that Arts. 14, 19 and 21 were not mutually exclusive. This means a law prescribing a procedure for depriving a person of 'personal liberty' has to meet the requirement of Art.19 also, the procedure established by law in Art.21 must answer the requirement of Art.14 as well.

According to Krishna Iyer J. no Article in part III of the constitution (dealing with fundamental rights) is an island, just as a man is not dissectible into separate limbs, cardinal rights in an organic constitution have a synthesis.

It is the most significant and creative aspect of

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4. Id at 284
5. Ibid

Maneka that, the court reinterpreted the expression 'procedure established by law' in Art. 21 and gave it a new orientation. Art.21 would no longer mean that law could prescribe some semblance of procedure, however arbitrary or fanciful, to deprive a person of his personal liberty. It would now mean that the procedure must satisfy certain requisites in the sense of being fair and reasonable. The procedure "can not be arbitrary, unfair or unreasonable". The concept of reasonableness must be projected in the procedure contemplated by Art. 21. The court now has power to judge the fairness and justness of procedure established by law to deprive a person of his personal liberty. The court reached this conclusion by holding that Arts, 21, 19 and 14 were not mutually exclusive, but were inter-linked.

According to Iyer J., Procedure in Art. 21 means fair, not formal procedure; 'law' is reasonable law and not any enacted piece. This makes the words "procedure established by law" by and large synonymous with the procedural due process' in the USA. This makes right of hearing a component part of natural justice. As the right to travel abroad falls under Art. 21, therefore, natural justice must be, applied while exercising the

power of impounding a passport under the passport Act. Although the passport Act does not expressly provide for the requirement of hearing before a passport is impounded, yet the same has to be implied therein.

But Gopalan on "law" remained intact even in Maneka. In his leading opinion Justice Bhagwati observed that Art.21 provided safeguards against executive interference which was not supported by a law and "law means enacted law or state law"[6]

Justice Chandrachud after noting the absence of 'due process clause" in the Indian constitution and its rejection by the constituent Assembly observed.[7]

> "The presence of due process clause in 5th and 14th Amendments of the American consitution makes a significant difference to the Approach of the American Judges to the definition and evaluation of constitutional guarantees. The content which was meaning-fully and imaginatively poured into 'due process of law' may, in my view, constitute an important point of distinction between the American constitution and ours which studiously avoided the use of that expression."

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6. Id at 281
7. Id at 327

He wanted to say that while American courts could examine not merely reasonableness of procedure (procedural due process) but also whether a law was fair, just and reasonable, the absence of a due process provision hindered the Indian courts to go so far as to scrutinize the morality or reasonableness of a law.

Justice Krishna Iyer's was the lone voice in Maneka who treated law as reasonable law and procedure as reasonable procedure. He was convinced that[8]

> "to frustrate Art.21 by relying on any formal adjectival statutes, however flimsy or fantastic its provisions be, is to rob what the constitution treasures ..... And 'law' leaves little doubt that it is normally regarded as just since law is the means and justice is the end."

In Sunil Batra[9] Justice Krishna Iyer was able to proclaim:[10]

> "True, our constitution has no due process clause but in this branch of law, after Cooperand Maneka Gandhi, the consequence is the same. For what is punitively outrageous, scandalicingly unusual or cruel

8. Id at 338
9. Sunil Batra V. Delhi Administration(1978)4 SCC.494
10. Id at 518

> or rehabilitatively counter - productive is unarguably unreasonable and arbitrary and is shot down by Arts.14 and 19 and if inflicted with procedural unfairness falls foul of Art.21."

Post Maneka cases witnessed an outburst of due proces decision converting most of Article 21 into a regime of positive rights. Right to life and personal liberty soon came to encompass within it the right to bail, right against solitary confinement, right to Humanetreatment in prison, the right to human dignity and even the right to get compensation for undergoing torture.[11] The court innovated the strategy of what is called public interest litigation or social action litigation,[12] enabling the public spirited individuals or groups to move the court to seek redress for the victimised groups. Then in several cases the court pre-empted legislative initiatives for reform in jail, bail and processual jurisprudence. But Art 21 still remained the

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11. M.H.Hoskeet V. state of Maharashtra(1978) 3 SCC 544, Hussainara Khatoon V. State of Bihar(1980)1SCC 81,91,93, 98, 108, Sunil Batra V. Delhi Administration(1980)2 SCC 648, Kedra Pehad-iya V. state of Bihar (1981)3 Sec 671, Prem Shankar Shukla V. Delhi Administration(1980)3 SCC 526, Francis Coralie V. Union Territory of Delhi(1982)1 Sec 608, Rudal Shah.V. State of Bihar AIR 1983 Sc.1061.

12. Upendra Baxi "Taking Suffering Seriously : Social action.

embodiment of procedural due process and had not matured as a limitation against legislative action. But Art, 21 still remained the embodiment of procedural due process and had not matured as a limitation against legislative action.

In Bachan Singh[13] the court again relied on the absence of the American due process clause and eight Amendment for upholding death panalty. Speaking for the majority, justice Sarkaria held that the courts were not law makers and thus could not sit over the wisdom of Parliament which alone could decide whether to retain or abolish death panalty. Chief Justice Chandrachud was party to Bachan Singh as well as to Sunil Batra, the former symbolising the legalist role perception of the justices and the latter, an activist reformist role.

In Bachan Singh, the court clarified that if Art. 21 was understood in accordance with Maneka it will-read to say:[14]

> No person shall be deprived of his life or personal liberty except accoreing to fair, just and reasonable procedure established by a valid law.

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litigation in the Supreme Court of India",
8-9 Delhi law review 91(1979-80); Parmanand Singh "Vindicating Public Interest Through Judicial Process: Trends and Issues", 10 India bar review 683 (1983)

13. Bachan Singh V. State of Punjab (1980)2 SCC 684
14. Id at 730

Bachan Singh re-affirmed that the 'all pervasive omnipresence of reasonableness of Art.14 influenced the interpretation of procedure' and not of 'law'.

In A.K. Roy[15] Chief Justice Chandrachud re-affirmed his Maneka position that Art.21 did not permit judicial review of reasonableness of the substantive portion of the law. It allowed judicial scrutiny of procedural fairness only. He held that,[16]

> "Power to judge the fairness and justness of procedure established by law for the purpose of Art.21 is one thing" but "the power to decide upon the justness of the law itself is quite another thing" and "such power springs from a 'due process' provision such as to be found in the fifth and 14th Amendments of the American Constitution."

Interestingly enough, Justice Bhagwati was a party in A.K.Roy yet in his dissenting opinion delivered by him in 1982 in Bachan Singh[17] decided subsequent to A.K. Roy, he took a view of Art.21 which makes a strange reading. This time he interpreted 'procedure' itself as including both substantive and procedural due process. He obsefved.[18]

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15. AK Roy V. Union of India (1982) I SCC 271
16. Id at 301
17. Bachan Singh V. State of Punjab (1982) 3 SCC 24
18. Id at 55

> "The word 'procedure' in Art. 21 is wide enough to cover the entire process by which the deprivation is effected and that would include not only the adjectival but also substantive part of the law ..... Every facet of the law which deprives a person of his life or personal liberty would, therefore, have to stand the test of reasonableness, fairness, and justness in order to be outside the inhibition of Art.21."

Underlying Justice Bhagwati's opinion is the notion that the substantive and procedural portions of law affecting deprivation are so inseparable that both must stand the test of reasonableness, fairness and justness. He believes that rule of law permeates the entire fabric of the constitution and constitute its basis feature.[19] Rule of law excludes arbitrariness and, therefore,

"law must not be arbitrary or irrational and it must satisfy the test of reason and the democratic form of policy",[20] and the framers of law are accountable to the people.

In Deena[21] though the Supreme Court upheld the procedure for executing death sentence by hanging a

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19. Id at 50
20. Ibid
21. Deena V. Union of India (1983) 4 SCC 645

convict by rope in the majority opinion written by Chief Justice Chandrachud it was observed.[22]

> "A two-fold consideration has to be kept in mind in the area of sentencing. Substan-tively, the sentence has to meet the constitutional prescription contained especially in Art.14 and 21. Procedurally the method by which the sentence is required by law to be executed has to meet the mandate of Art.21."

Thus every procedure prescribed by law need not satisfy the quality of law preseribed by Art.14 in order to be outside the inhibition of Art.21. The court in Deena, therefore, upheld the exeeution of death sentence by hanging by rope because according to the court, it was not a cruel, barbarious and degrading method. The justices discussed only the question of burden of proof under Arts.14,19 and 21 but the procedure prescribed by sec.354 (5) was never tested upon the touchstone of reason-ableness of Art.14. It means that Art.14 will be invoked only if it is shown that although the procedure fulfills the requirements of Art.21, it also violates Art.14.

Mithu[23] involved the constitutional validity of Sec. 303 of IPC prescribing mandatory death sentence for the

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22. Id at 689
23. Mithu V. State of Punjab (1983)2 SCC 278

offence of murder committed by a convict undergoing life sentence. The court struck down Sec.303 of the IPC as violative of Arts.14 and 21. Since Sec 303 involved the substantive portion of the law in the area of sentencing it had to meet the requirement of reasonableness of Art. 14 in order to be in conformity with Art.21.

In Mithu the absence of a due process clause did not hinder the chief justice to go into the question of the morality or justness of the law as distinguished from the justness of the procedure. The supreme court characterized the provision of mandatory death sentence as anachronism and out of tune with the constitutional values. Such a provision excluded judicial discretion in the area of sentencing and treated equals as unequals. This judicial role perception is quite different from the legalist stance in Bachan Singh. Mithu declared that the ultimate decisions as to justice and fariness rested on the courts and not on parliament. The chief justice declared.[24]

> "It is now too late to contend that it is for the legislature to provide punishment and for the courts to impose it .... A savage sentence is anathema to the civilised jurisprudence of Art. 21.

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24. Id at 284

Apparently the court in Mithu was able to declare "savage sentence" as "anathema to the civilised jurisprudence of Art.21" only if it had the power to scrutinise the reasonableness of the substantive portion of a law. Savagery of sentence is an attribute of substantive law and not procedural law. The court expressed willingness to strike down all laws which were found to be unfair, unjust and unreasonable.[25]

> " A law providing that an accused shall not be allowed to lead evidence in self defence will be hit by Arts. 14 and 21. Similarly if a law were to provide that the offence of theft will be punishable with penalty of the cutting of hands the law will be bad as violating Art. 21."

Mithu implies that in the area of sentencing the substantive portion of law are so interwined with procedural portions that reasonableness of both has to be tested in order to be in conformity with Arts. 14, and 21. The result achieved in Mithu is indeed commendable one.

Andhra High Court has interpreted Mithu as authorising of the court in India to invalidate the substative provisions of a law as unreasonable unjust and unfair.

25. Ibid

Mithu has been applied by Andhra H.C. in T. Sareetha V. Venkata Subbiah[26] for invalidating section 9 of the Hindu Marriage Act 1955 providing for the matrimonial remedy of restitution of conjugal rights. Before Mithu no one could even think of examining the policy behind Sec.9 of the Hindu Marriage Act 1955. Mithu enabled the Andhra Court to describe the decree of restitution as a "savage" and barbarious remedy violating the right to marital privacy implicit in Art. 21. The decree of restitution 'enforcing restitution of conjugal rights was described by the court as constituting the starkest form of governmental invasion of personal identity and individual zone of intimate decisions. The victim, according to the court, was stripped of her control over the various parts of her body, subjugated to the hmiliating sexual molestation accompained by a forcible loss of the precious right to decide when, if at all, her body should be allowed to be used to give birth to another human being. Since restitution decree ended up in forcible sexual relation it violated Arts.14 and 21.[27] Sareetha demonstrates that the question whether a Hindu marriage is a celestial bond or a samskara involving sublime sentiments and mutual love or is simply a vehicle for sexual enjoyment is a matter of

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26. AIR 1983 A.P. 356

27. Id at 372

judicial scrutiny and it is the court, not parliament, which is a true reflex of social values.

The court in Sarsetha drew its sustenance from Mithu is clear from the following reading of Mithu by Andhra High Court.[28]

> "The reasoning of Supreme Court in Mithu's case comes very close to the reasoning adopted by the American Supreme Court in cases like Lambart V. California, decided upon the basis of substantive due process clause. After Mithu's case it is not easy to assert that Art. 21 is confined any longer to procedural protection only. Procedure and substance of law now comingle and overlap each other to such a degree rendering that a finding of any law that can completely establish a valid procedure for the enforcement of a savage punishment impossible."

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28. Id at 372.

CONCLUSION

'Due process' clause has been the most significant single source of judicial review in the U.S.A. The concept of due process of law is to be traced to the Magha Carta of 1215. The phrase "due process of law" did not occur in the Magna Carta but in later statutes of English law that phrase was used synonymously with the phrase "law of the land". By the petition of right of 1628 due process of law was understood as a limitation upon the arbitrary power of the king or the executive.

The framers of the American Constitution did not put the "Due Process" clause" into the original document. The clause was included in the bill of rights and appears in the fifth and Fourteenth Amendments adopted in 1791 and 1868 respecitvely Fifth amendment imposed a limitation upon federal power and fourteenth, upon the states.

The word, 'due' is interpreted as meaning 'just', 'proper' or 'reasonable'. Therefore the courts can pronounce whether a law affecting a person's life, liberty or property is reasonable or not. The court may declare a law invalid if it does not accord with its notions of what is just and fair in the cirumstances.

The first case in which the Supreme Court of United States Considered the Due Process clause of the 5th Amendment was Murray's lessee V. Hoboken land and Improvement Co. In this case the court departed from the meaning of due process as understood in England and held that it operated as a limitation not only on the executive but on the legislature as well.

Due process has two aspects, substantive provisions of a law should be reasonable and not arbitrary. Procedural due process envisages a reasonable procedure ,i.e the person affected should have fair right of hearing. Under the concept of 'due process' the courts become the arbiter of reasonablene: of both substantive as well as procedural provisions in a law.

Art. 21 of the Indian Constitution is the counterpart of Draft Art.15 which, as originally passed by the constituent Assembly, provided that "No person shall be deprived of his life or liberty without due process of law.".

Thus the American due process clause was adopted in India in Draft Art.15. But the Drafting Committee Suggested, inter alia, the substitution of the expression "except accordinc to procedure established by law" for the words "without due

process of law". The reason given for the change was that the substituted expresion was more specific. Both substantive and procedural "due process" were well established in the United States, and though the concept of "due process " was vague and flexible it was used to enforce certain standards to which according to the majority of Judges of the U.S. Supreme Court substantive and procedural laws had to conform. However, the abuse of substantive due process by the US. Supreme Court produced second thoughts and "due process" was replaced by procedure established by law". This change was the result of a discussion which the constitutional Adviser, Sir B.N. Rao had with Mr. Justice Frankfurter of the U.S. Supreme Court.

Art. 21 of the Indian Constitution lays down that no person shall be deprived of his life or personal liberty except, according to 'procedure established by law. The question of interpretation of the words 'procedure established by law' arose in the famous Gopalan case. The main question was whether the words procedure established by law' adopted in Art. 21 corresponds to the American concept of due process i.e. Whether Art. 21 envisaged any procedure laid down by a law enacted by a legislature or whether the procedure should be

fair and reasonable. The Supreme Court held that the expression "procedure established by law" in this Art. was not to be given a wide and rather fluid meaning of the expression "due process of law" under the American constitution. It means only state-made law of a statutory origin. The court pointed out that the constituent Assembly had deliberately rejected the expression "due process of law", It had preferred to adopt the expression 'procedure established by law borrowed from Art. 32 of the Japanese constitution. The view of the majority in the words of Patanjali Sastri J. is as under.

> "Giving full effect to these Principles, however, I am unable to agree that the term 'law' in Art. 21 means the immutable and universal principles of natural justice, Procedure established by law ' must be taken to refer to a procedure which has a statutory origin, for no procedure is known or can be said to have been established by such vague and uncertain concepts as the immutable and universal principles of natural justice . In my opinion, 'law ' in Art. 21 means positive or state-made law". [1]

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1. A.K. Gopaln V. State of Madras AIR 1950 SC.27.

Gopalan held the field for almost three decades. Gopalan settled two major points in relation to Art. 21. One Art. 19 and Arts. 21 and 22 were mutually exclusive and that Art. 19 was not to apply to a law affecting personal liberty could not be declared unconstitutional merely because it lacked natural justice or due procedure.

As interpreted in Gopalan, Art. 21 provided no protection or immunity against competent legislative action. Art. 21 gave a Carte blanche to a legislature to enact a law to provide for arrest of a person without much procedural safeguard. It gave final say to the legislature to determine what was going to be the procedure to curtail the personal liberty of a person in a given situation and what procedural safeguards, he would enjoy. Because of the impotence of Art. 21 as a protection against legislative action, it may not be correct to assume that the constitutional provision was of no value. Art. 21 served as a restraint upon the executive which could not proceed against an individual to curtail his personal liberty save within the four corners of the law. It resulted in several postulates. A person could not be deprived of his life or personal liberty merely by an executive

fiat without there being a valid law to support it.

In course of time, this rigid judicial view was softened somewhat. The beginning of the new trend is to be found in the Bank Nationalization case decided in 1970 where in Art. 19(1)(f) was applied to a law. enacted under Art. 31(2). But hitherto the marked distinctions between due process' clause and the 'procedure established by law' had been maintained throughout.

Maneka was believed to have resurrected American Procedural due process in Art. 21 which was freed from the confines of Gopalan on 'Procedure'. As a result of Maneka for the first time the principles of natural justice came to be included within the scope ot Art. 21. Maneka's case has laid down that personal liberty can not be cut out or cut down without fair legal procedure.

Maneka thus projected the concept of reasonableness of Art 14 in the procedure contemplated under Art. 21 in order to produce the effects of American procedural due process. Ironically, the allpervasive omniprsence of reasonableness of Art. 14 equality- equal protection guarantee was discovered

by the supreme Court only in the year 1978. When the constituent Assembly in rejecting due process' would never have intended to include the same concept in the equality guarantee. Be that as it may, the procedural due process had become an integral part of a procedure in Art.21 as a result of Maneka. But Art. 21 still remained the embodiment of procedural due process and had not matured as a limitation against legislative action .

In A.K. Roy Chief Justice Chandrachud reaffirmed his Maneka position that Art. 21 did not permit judicial review of reasonableness of the substantive portion of the law. It was only in 1982 subsequent to A.K. Roy when Justice Bhagwati in Bachan Singh interpreted 'procedure' itself as including both substantive and procedural due process.

Since A.K. Roy came as an obstacle to such kind of judicial inquiry, in Mithu[1] the chief justice chandrachud found the opinion of Justice Krishna Iyer in Sunil Batra as of great help to him. After quoting with approval the observation of Justice Krishna Iyer that "true our constitution has no due process clause but after Maneka Gandhi the

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1. Mithu VS state of Punjab (1983) 2 SCC 278.

consequence is the same". he extracted the following observation of Justice Desai in the same case.[1]

> "The word 'law ' in the expression 'procedure established by law' in Art. 21 has been interpreted in Maneka Gandhi's case that law must be right, just and fair and not arbitrary, fanciful or oppresive".

Therefore, the swing of the pendulum clearly indicates that the deprivation of the liberty, if it merely answers the procedure, it will not be sufficient. That procedure must be fair and reasonable. Fairness and reasonableness must answer the principles of natural justice.

To sum up, today to meet a challenge that Art. 21 has not been violated it must be established that both the substantive law and the procedural law have been complied with.

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1. Id at 284.

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